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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

MIRIAM DONNER,

Petitioner,

vs.

APPALACHIAN INSURANCE COMPANY, a Rhode Island Corporation, CITY OF MIAMI, VERNON HETHERINGTON, FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A. a/k/a FOWLER WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENTS', CITY OF MIAMI'S AND VERNON HETHERINGTON'S, BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court is vested with Certiorari jurisdiction under *28 U.S.C. §1257(a)* to review a state court decision which is not final, does not draw into question the validity of either a treaty or statute of the United States or statute of any state, and further does not pass on any questions of federal law?

2. If so, whether this court should exercise its discretion, in favor of declining jurisdiction?

3. Assuming this Court exercises its discretion in favor of accepting Certiorari jurisdiction, whether the Petitioner has, in the four corners of the complaint, set forth a federal cause of action sounding under *42 U.S.C. §1983* and or under *18 U.S.C. §1964*?

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CONCISE JURISDICTIONAL STATEMENT

Petitioner seeks to invoke the certiorari jurisdiction of this Court under *28 U.S.C. §1257(a)*.

In 1988, *28 U.S.C. §1257* was amended and the jurisdiction of this Court thereunder limited. Congress did away with the appeal of right and left only certiorari, which is not a matter of right, but of judicial discretion. Certiorari shall only be granted where there are special and important reasons therefore. *Rules of the Supreme Court of the United States, Rule 10.*

The Petitioner has failed to invoke said certiorari jurisdiction, as the state court judgment: (1) does not challenge the validity of the Constitution, treaties, laws or statutes of the United States, (2) does not draw into question a state statute as repugnant to the Constitution; (3) is not final within the meaning of *28 U.S.C.*

§1257(a); (4) does not turn on federal law; as (5) no federal question was presented in an appropriate forum, time and manner; and thus, (6) turns solely on state law, specifically state procedural law, as to the appropriate forum, time and manner.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Respondents herein assert that there are no United States Constitutional provisions or federal statutes involved, as same have not been properly brought forth in the Complaint or throughout the judicial proceedings below, and are mere frivolous averment. Nonetheless, the constitutional provisions and statutes set forth by the Petitioner in the Petition for Writ of Certiorari are fully set forth therein, and pursuant to *Rules of the Supreme Court of the United States, Rule 24.1(f)*, need not be set forth herein.

The only federal statute involved as a

practical matter is *28 U.S.C. §1257(a)* which states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

CONCISE STATEMENT OF THE CASE

To fully understand the posture of this case, one must return to the Metropolitan Justice Building (the criminal courthouse) in Miami, Dade County, Florida, in 1975. There, Petitioner, dressed in hot pants, a halter top, high heeled shoes and wearing a wig, was picketing and presenting petitions to pedestrians. She was claiming

that a then State of Florida Circuit Court Judge had denied her a fair trial in a civil lawsuit unrelated to the instant actions, and that there was a conspiracy against her.

As the crowd grew larger, VERNON HETHERINGTON, then a City of Miami police officer, requested that the Petitioner move from the area in front of the front doors and steps of the building to another area in front of the building. The Petitioner not only refused to move but instructed Hetherington to arrest her. After several requests, Officer Hetherington arrested the Petitioner and charged her with breach of the peace. Petitioner was then turned over to the Metropolitan Dade County Correctional Department, by whom she was incarcerated.

In 1976, Petitioner filed the first of several civil lawsuits. The complaint filed therein, against the City of Miami,

Vernon Hetherington, Appalachian Insurance Company[1], Metropolitan Dade County[2] and other Dade County Correctional Officers arose out of the 1975 arrest and incarceration.

In this 1976 civil litigation, Fowler, White, Burnett, Hurley, Banick and Knight, P.A., a/k/a Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., a Florida professional association, and attorneys Phillip W. Knight[3] and Michael J. Murphy (hereinafter collectively "THE ATTORNEYS") were attorneys of record representing the

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[1] Appalachian Insurance Company, a Rhode Island corporation, was a liability insurer for the City of Miami and police officer Vernon Hetherington.

[2] Metropolitan Dade County Department of Corrections and its officers while not parties to this Petition for Writ of Certiorari, nor to the state proceedings below, were a party to the initial 1976 litigation filed by Petitioner.

[3] Now Honorable Judge Phillip W. Knight of the Eleventh Judicial Circuit in and for Dade County, Florida.

City of Miami, police officer Vernon Hetherington, and Appalachian Insurance Company (hereafter collectively "INITIAL DEFENDANTS").

During the course of the 1976 lawsuit, the INITIAL DEFENDANTS through THE ATTORNEYS responded to various discovery, including interrogatories, sent a letter to the Petitioner, filed responses to three separate Requests for Production which had been propounded by the Petitioner, and filed a response to the Petitioner's Motion for Sanctions. All these actions were taken in and relevant to the 1976 litigation.

In April, 1980, the action came to be heard for jury trial[4,5]. The trial court

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[4] The case had previously been disposed of by way of Summary Judgment, however, it was appealed to the Third District Court of Appeal of the State of Florida, which reversed the Summary Judgment and remanded for trial. *Donner v. Hetherington*, 370 So.2d 1225 (Fla. 3rd DCA 1979).

directed a verdict in favor of the Initial Defendants and allowed the jury to reach a verdict against the remaining defendants, Metropolitan Dade County and the Dade County Correctional Officers. The jury returned a verdict in favor of the Petitioner, Miriam Donner, in the amount of $15,000 against those defendants.[6]

The Petitioner exercised her right to appeal the directed verdict, and the judgment entered thereon. Again, the Third District Court of Appeals of the State of

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[5] The action had also come to trial once before, however, it was terminated and dismissed by the judge due to the obstreperous conduct of the petitioner herein, Miriam Donner. That too was the subject of an appeal. *Donner v. Hetherington*, 376 So.2d 404 (Fla. 3d DCA 1979).

[6] The claim against the county defendants was for post-arrest conduct involving her confinement and treatment in jail. The City of Miami, police officer Vernon Hetherington, Appalachian Insurance Company and THE ATTORNEYS, are not, either in the 1976 litigation or in the instant litigation, charged or chargeable for that post-arrest conduct.

Florida reversed the directed verdict and remanded the cause for a new jury trial wherein the Petitioner could re-present all of her evidence, to a jury, on the issues of liability and damages against the INITIAL DEFENDANTS.[7]

It must be pointed out that despite the passage of nearly eleven (11) years from the final remand for trial, the re-trial of this 1976 litigation has not yet occurred. Petitioner would have this court believe that this is due to the Respondent's conduct. However, it is due, *inter alia*, to the Petitioner's multiple Motions for Recusal of many different Circuit Court Judges, and, Motions for Continuance.

Instead, in 1981 the Petitioner filed another lawsuit (hereinafter lawsuit No. 2), this time against: The City of Miami,

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[7] *Donner v. Hetherington*, 399 So.2d 1011 (Fla. 3d DCA 1981).

the Assistant City of Miami Attorney, Steve Edelstein; and, Michael J. Murphy (one of THE ATTORNEYS). She sought access to all of the personal litigation files of THE ATTORNEYS, which were created in connection with defending the Petitioner's claims in lawsuit No. 1. THE ATTORNEYS objected to the request and refused to produce the documents. The Petitioner asserted that since the documents were created by THE ATTORNEYS while acting on behalf of the City, they were susceptible to discovery under the *Freedom of Information Act* (government in the sunshine).

This 1981 action proceeded to the Florida Supreme Court, and, the documents were ordered to be produced. Eventually, on August 19, 1985, the requested records were produced pursuant Court Order. The Petitioner now has all of the records and

information which she has sought.[8]

Thereafter, on August 21, 1989, the Petitioner filed yet another action, the instant action, (hereinafter lawsuit No. 3) naming as defendants not only the parties to lawsuit No. 1, but also THE ATTORNEYS. The Petitioner in the Complaint in lawsuit No. 3, unartfully, unsuccessfully, and with the delicate precision of a jackhammer operator, attempts to state a cause of action for fraud, based upon the conduct of the INITIAL DEFENDANTS and THE ATTORNEYS in the judicial proceedings related to lawsuit No. 1 and lawsuit No. 2.

The City of Miami, and police officer Vernon Hetherington, filed their Motion to Dismiss, as did the other defendants,

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[8] *The Freedom of Information Act, F.S. §119* has subsequently been amended, and the work product and attorney-client privilege objection and defense asserted by THE ATTORNEYS in the aforementioned action was codified as an exception to the *Freedom of Information Act.*

setting forth, *inter alia*, that the Complaint failed to state a cause of action upon which relief can be granted. The motions, of the various parties, to dismiss Petitioner's complaint, were heard before the Court, having been duly noticed, and the Court granted all motions to dismiss the complaint with prejudice.

Petitioner moved for rehearing, which was denied. In her motion, she raised for the first time, albeit on a cryptic and colorless basis, the notion that her Complaint somehow involved, *inter alia, 42 U.S.C. §1983* civil rights violations and, *18 U.S.C. §1964 RICO*.

The Petitioner filed her appeal with the Third District Court of Appeal for the State of Florida. The issues asserted on appeal by the Petitioner were briefed by the parties and oral argument received by the court.

It must be pointed out that in the

instant case, before the trial court, the Petitioner herein was represented by counsel, and certainly, at the Third District Court of Appeal, she was represented by counsel not only for the purposes of authoring a brief, but also for the purposes of presenting oral argument.

The Third District Court of Appeal affirmed the Order dismissing the cause of action, setting forth that the litigation conduct complained of was afforded common law immunity, and, inviting the Petitioner to amend her complaint in the original 1976 litigation to seek redress for her grievances in connection with the discovery and other litigation conduct which took place in that 1976 proceeding.[9]

The Petitioner filed a Motion for Rehearing, Certification or Clarification

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[9] The opinion of the Third District Court of Appeals in this case is reproduced in the Petitioner's Petition for Writ of Certiorari as an Appendix on Page A-1.

and Rehearing En Banc, which was denied by the Third District Court of Appeal. (Petitioner's Petition for Writ of Certiorari at Page A-11).

Thereafter Petitioner sought the discretionary jurisdiction of the Florida Supreme Court by petitioning for Writ of Certiorari, which was, on October 29th, 1991, denied by the Florida Supreme Court. (Petitioner's Petition for Writ of Certiorari at A-10).

Thereafter, on January 24, 1992, the Petitioner filed the Petition for Writ of Certiorari in this Supreme Court of the United States. Pursuant to *United States Supreme Court Rules, Rules 15.2, 24.2, 29.2, and Rule 33*, this Brief in Opposition to the Petition for Writ of Certiorari is filed.[10]

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[10] Your undersigned counsel is not an admitted member of the United States Supreme Court Bar, however, has, on January 29, 1992, filed a Motion for Admission to

SUMMARY OF THE ARGUMENT

The discretionary jurisdiction of this Court pursuant to *28 U.S.C. §1257(a)* has not been properly invoked. The state court judgment does not challenge the validity of a State statute or challenge the validity of any provision of the Constitution or statutes of the United States of America.

The state judgment is not final within the meaning of *28 U.S.C. §1257(a)*. There has not been an effective termination of the litigation, as more remains to be done and decided. Review would be advisory and create piecemeal litigation.

The federal claims, if any, of the Petitioner herein, though not timely addressed or raised, are not foreclosed by the judgment and accordingly this matter is

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the Bar, Oath of Admission, and supporting application and affidavits, which Motion remains pending at the time of filing this Brief.

not ripe for adjudication by this Court.

The state court judgment decides only issues of state law. It did not, has not, and need not address any federal issues, as same were not properly presented.

The procedural path chosen by the Petitioner for the redress of her grievances was improper. The state court correctly dismissed the action and directed the Petitioner to the appropriate procedural course.

The Petitioner's complaint fails to set forth a cause of action for denial of access to courts. The complaint does not allege conduct by the Respondents which prevented the Petitioner from seeking redress, otherwise punished her for doing so, or had a chilling effect on her.

The Complaint fails to set forth that or any other federal cause of action sounding under *42 U.S.C. §1983*. However, on the face of the complaint, the

Respondents are protected by the common law immunity afforded in judicial proceedings. *42 U.S.C. §1983* does not abrogate the absolute immunity existing at common law.

The complaint fails to set forth a cause of action under *18 U.S.C. §1964*. The conduct complained of does not set forth a single act, much less a sufficient pattern of racketeering activity, which is itself subject to criminal sanctions or traditionally criminal in nature sufficient to constitute a predicate act under *18 U.S.C. §1964*. Further, Petitioner fails to allege an injury contemplated by the statute.

ARGUMENT

I. THE CERTIORARI JURISDICTION OF THIS COURT PURSUANT TO *28 U.S.C §1257* HAS NOT BEEN INVOKED.

A. CERTIORARI JURISDICTION OF THIS COURT.

The Supreme Court of the United States, a creation of Article III of the

Constitution of the United States, is a court of limited jurisdiction. The Supreme Court can exercise no appellate jurisdiction except in cases, and in the manner and form defined and prescribed by Congress. *American Construction Company v. Jacksonville T & KWR Company, 143 U.S. 372 (1893), 37 L.Ed. 486, 13 S.Ct. 758 (1893).* The appellate jurisdiction in the federal system is purely statutory. *Heike v. United States, 217 U.S. 423, 54 L.Ed. 821, 30 S.Ct. 539 (1910).*

United States Supreme Court Rule No. 10 states:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor."

The Petitioner herein has attempted to invoke the jurisdiction of this court under Statute *28 U.S.C. §1257(a)*, which statute allows that the Supreme Court of the United

States *"may"* review *"final"* judgments or decrees rendered by the highest court of a state in conformity with *28 U.S.C. §1257(a)*.[11]

Such jurisdiction of this Court is improper in the instant action, in that the state court judgment sought to be reviewed is not final; does not challenge the validity of a statute of the United States of America; does not challenge the validity of a statute of the State of Florida as being repugnant to the Constitution; and does not deny a federal right specially claimed.

Rather, as will be set forth below, the judgment of the state court is grounded solely upon independent state grounds; dismisses the Petitioner's cause as being in the improper procedural posture under State law, and in no way is decided upon

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[11] See page three above for full text.

federal grounds, as a federal cause of action was not properly presented.

B. THE JUDGMENT IS NOT FINAL WITHIN MEANING OF 28 U.S.C. §1257(a).

The first word in the jurisdictional entitlement of *28 U.S.C. §1257(a)* is the word **final**. A plethora of decisions by this Court turn on the issue of the finality of a particular judgment in a state court. The finality requirement of *28 U.S.C. §1257*, limits the United States Supreme Court's review of state court judgments to "final judgments". It serves to: (1) avoid piecemeal review by federal courts of state court decisions, (2) avoid giving of advisory opinions in cases where there may be no real case or controversy in the sense of Article III of the Constitution and, (3) limit federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusions in state affairs. *North*

Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 38 L.Ed. 379, 94 S.Ct. 407 (1973).

While recognizing that the determination of finality under *28 U.S.C. §1257* is a question of purely federal law to be resolved by this United States Supreme Court, said determination is to be made by examination to the entire or whole record. *Gotthilf v. Sills*, 375 U.S. 79, 11 L.Ed. 2d 159, 84 S.Ct. 187 (1963); *Construction and General Laborers' Union v. Curry*, 371 U.S. 542, 9 L.Ed. 2d 514, 83 S.Ct. 531 (1963).

A state court judgment in order to be final for the purposes of review by this Supreme Court of the United States must be the final word of the final court in the sense that: (1) it must be subject to no further review or correction in any state tribunal and, (2) it must be effective determination of litigation and not merely

interlocutory or intermediate steps therein. *Market S.R. Company v. Railroad Com. of California*, 324 U.S. 548, 89 L.Ed. 1171, 65 S.Ct. 770 (1945).

The possibility that matters left open by the state court's judgment may generate additional constitutional questions requires a finding that the finality essential to the review of such judgment by the Supreme Court of the United States does not exist. *Republic Natural Gas Company v. Oklahoma*, 334 U.S. 62, 92 L.Ed. 1212, 68 S.Ct. 972 (1948).

The Third District Court of Appeal of the State of Florida affirmed the trial court's dismissal of the Petitioner's complaint. The District Court also directed the Petitioner to seek to amend her complaint in the initial 1976 lawsuit to attempt to include whatever claims she may have. This is not a final order within the purview of *28 U.S.C. §1257*, and

accordingly the jurisdiction of this Court is improper.

What remains to be done is for the Petitioner to amend her complaint in the 1976 action, to attempt to state causes of action under either state or federal law, and allow the court in which the alleged improper conduct took place to make a full and final determination of the issues presented therein. Until such amendment is sought and/or made, there is no "case or controversy" under Article III.

Even if this Court were to accept jurisdiction in this case and render a decision on whether Petitioner did, could, or would state a federal cause of action, nonetheless, the very same issues can and will be presented by the Petitioner in the initial 1976 litigation. Hence this Court runs the very serious and practical risk of condoning and participating in piecemeal litigation. This court would be giving an

advisory opinion where the real "case or controversy" is not properly before this Court, but rather is awaiting the Petitioner's amended complaint in the 1976 action. This would constitute more than a minimum federal intrusion into the State of Florida's procedural affairs in terms of dictating when and where the cause of action is properly brought under state procedural law.

There is more than the mere possibility that there are matters left open by the state court's judgment which may and will generate additional constitutional questions, and that there is something more of substance which remains to be decided at the trial court level of the Florida state courts.

Indeed, the District Court recognized that the litigation was not over, when it said:

"It has been well said that there

> must be some point in every court proceeding when the cause is finally disposed of, its thread cut, and parties out of court...The public welfare demands that there shall be some definite end to litigation--a point sometime, somewhere, when every case is terminated. We cannot afford to return to the interminable and outrageous practice similar to that depicted in Dickens' case of *Jarndyce v. Jarndyce*." *Mabson v. Christ*, 96 Fla. 756, 759, 119 So. 131, 132, (1928). We trust that trial of this cause will occur before the litigation assumes such Dickensian proportions."

Accordingly, the finality requirement of *28 U.S.C. §1257* has not been met and the jurisdiction of this Court thereunder does not lie.

C. THE COMPLAINT DOES NOT RAISE A FEDERAL ISSUE.

Jurisdiction of the Supreme Court to review proceedings of the state courts is not that of a general reviewing court in error, but is limited to ***specific instances of denials of federal rights***, specially set up in state court and denied by the rulings

and judgment of that court. *Auters-Price Oil Company v. Texas*, 212 U.S. 86, 53 L.Ed. 417, 29 S.Ct. 220 (1909).

Such jurisdiction turns upon whether the federal right was ***specially set up*** or claimed in that court and ***denied by its decision***. *28 U.S.C. §1257(a); Parker v. McLain*, 237 U.S. 469, 59 L.Ed. 1051, 35 S.Ct. 632 (1915).

Indeed, federal courts have no power to review judgment of a state court except where a ***substantial*** federal question is involved. *Reich v. Freeport*, 388 F.Supp. 953 (N.D. Ill. 1974). Moreover, a ***real***, and ***not a fictitious*** federal question is essential to the jurisdiction of the Supreme Court of the United States to review a judgment of a state court. *Caldwell v. Texas*, 137 U.S. 692, 34 L.Ed. 816, 11 S.Ct. 224 (1891).

Thus, the next issue with respect to this Court's jurisdiction is whether the

Petitioner has raised a **real** and **substantial** federal question.

It is recognized that the determination of whether a federal question is presented is itself a federal question. *Honeyman v. Hanan*, 300 U.S. 14, 81 L.Ed. 476, 57 S.Ct. 350 (1937).

A plain reading of the complaint[12] fails to disclose the presentment of a claim for the denial of the federal right of access to the courts; fails to disclose a cause of action for Racketeer Influenced and Corrupt Organization violation (RICO); and fails to disclose any other cause of action for denial of the privileges and immunities afforded under the Constitution or its amendments. What one sees when reviewing the complaint is merely an attempted cause of action for fraud based

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[12] The complaint is reproduced in full in the Appendix to this Brief in Opposition.

upon alleged discovery violations in the 1976 lawsuit.

Although the words "under color of state law" appears several times throughout the complaint, they are primarily addressed to the conduct which gave rise to the initial litigation. When these words are used to refer to the conduct which gives rise to the alleged cause of action in the instant case, they are insufficient to properly set forth a ***real*** and ***substantial*** federal question. *Delmar Jockey Club v. Missouri*, 210 U.S. 324, 52 L.Ed. 1080, 28 S.Ct. 732 (1908). No real and substantial federal right was ***specially set up***.

The assertions by the Petitioner in her motion rehearing[13] at the trial court level are untimely and insufficient. *New Orleans Waterworks Company v. Louisiana*

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[13] The motion for rehearing, and the addendum to motion for rehearing are reproduced in the Appendix to this Brief in Opposition.

Sugar Refining Co., 185 U.S. 336, 46 L.Ed. 936, 22 S.Ct. 691 (1902). They lack all color or merit, and have no substance or foundation. The mere fact that the words are raised is not sufficient to invoke the Supreme Court jurisdiction. *Louisiana Sugar Refining Co., supra*.

The manner of raising the federal question is a significant consideration in determining whether jurisdiction will lie. A federal question must have been set up at the proper time and in the proper way. *Jacobi v. Alabama*, 187 U.S. 133, 47 L.Ed. 106, 23 S.Ct. 48 (1902).

The jurisdiction of the United States Supreme Court to review a judgment of the state court cannot be invoked on the ground of denial of a title or right claimed under the Constitution or statute of the United States, unless it is specially set up or claimed at a proper time and in a proper way; and such claim cannot be a matter of

mere inference, but requires averment **so distinct and positive as to place it beyond the doubt that it was intended to assert a federal right**. *Union Mutual Life Insurance Company v. Kirchoff*, 169 U.S. 103, 42 L.Ed. 677, 18 S.Ct. 260 (1898).

The mere averment of a possible federal question in the motion for rehearing and in the Petitioner's briefs, without color or grounds therefore, is insufficient to sustain the jurisdiction of the Supreme Court. *Bowe v. Scott*, 233 U.S. 658, 58 L.Ed. 1141, 34 S.Ct. 769 (1914).

In the instant case, the first mention of any indication that a federal right was possibly being raised was in the Petitioner's motion for rehearing of the Respondent's motion to dismiss. Even there, it was a hollow one line averment that the complaint set forth a cause of action under the RICO statutes. Shortly thereafter, a supplement to the motion for

rehearing was filed containing a mere averment, colorless and unsubstantial, that the complaint set forth a cause of action under *42 U.S.C. §1983*. These untimely, meritless, colorless, frivolous and unsubstantial mere averments of a federal question are insufficient to present a federal issue.

D. THE STATE DECISION DOES NOT TURN ON A FEDERAL ISSUE.

A federal right must be both specially set forth ***and denied***. *Parker, supra*. Where a state court bases its judgment on grounds other than law arising under a federal question, the United States Supreme Court will not take jurisdiction. *DeSaussure v. Gaillard*, 127 U.S. 216, 32 L.Ed. 125, 8 S.Ct. 1053 (1888). The jurisdiction by the United States Supreme Court cannot be sustained where the decision of the state court appealed from was made upon rules of general

jurisprudence, or other grounds, broad enough in themselves to sustain the judgment without considering the federal question appearing in the case but not necessarily involved. *New Orleans v. New Orleans Waterworks Company*, 142 U.S. 79, 35 L.Ed. 943, 12 S.Ct. 142 (1891).

Assuming, *arguendo*, that a federal right was specially set up, it certainly was not denied by the decision to be appealed herein. The state court judgment does not deny any federal rights whatsoever.

Rather, it makes a determination, under state law and applicable to state law claims[14] that: (1) the complaint fails to state a cause of action upon which relief can be granted; (2) an immunity exists; and, (3) if, the Petitioner does or may

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[14] Only state law claims are alleged in the complaint. See I. C., *supra*, and III and IV, *infra*.

have a cause of action, state or federal, that it is properly brought in the initial 1976 litigation where the alleged misconduct occurred.

It is not sufficient to give the Supreme Court jurisdiction that a federal question might have been raised or might have been decided and involved in the case. It must appear, either in direct terms, or by necessary intendment, that it was in fact brought to the notice of the court ***and decided by it***. *Crowell v. Randell*, 35 U.S. 368, 9 L.Ed. 458 (1836). It must also appear that the decision of a federal question was necessary to the determination of the cause and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *Brown v. Atwell*, 92 U.S. 327, 23 L.Ed. 511 (1876).

The Third District Court of Appeal of the State of Florida did not decide federal

questions, nor was it necessary for any federal question to have been decided. Rather, the District Court must have determined that any federal question, if one existed, was not properly brought procedurally. Said causes of action, if any, must be brought in the 1976 litigation by way of an amended complaint.

In the instant case, the District Court rendered its ruling on state law common law immunity and on the improper procedural posture of the case before the court. Indeed the District Court rendered its judgment on grounds of general jurisprudence and other grounds relating to the abuses of the judicial process which have resulted at the hands of the Petitioner throughout the course of this seventeen (17) year morass.

In conclusion, the jurisdiction of this Court under *28 U.S.C. §1257(a)* does not lie in the instant action as a federal

issue was not timely presented herein in a procedural posture so as to allow the state courts to decide it, was not decided by the state court, and the judgment rendered by the state court, lacks the requisite finality.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION IN FAVOR OF DECLINING CERTIORARI JURISDICTION.

Assuming, *arguendo*, that the jurisdiction of this court is properly invoked under *28 U.S.C. §1257(a)*, such jurisdiction is merely discretionary; it is not as of right. The presence of the phrase "may be reviewed" clearly sets forth the discretionary, as opposed to mandatory nature of the jurisdiction. Congress has limited this Court to discretionary jurisdiction through its 1988 amendment of this statute, which disposed of the appeal of right found in subparagraphs 1 and 2 of former 28 U.S.C. §1257 (1970).

Indeed *Rule 10 of the United States*

Supreme Court Rules sets forth the proposition that certiorari is not a matter right but of judicial discretion. It goes on to set forth some general considerations governing the court's exercise of its discretion.

Subparagraph (a) of Rule 10 dealing with actions of Federal Circuit Courts is unquestionably inapplicable to the instant case. Subparagraph (b) deals with a state court's decision which is in conflict with the decision of another state court or of United States Court of Appeal.

The instant decision is in no way in conflict with decisions of another state court or United States Circuit Court of Appeal on any federal question. Rather, no federal question was decided, and the court invited the Petitioner to seek to raise the federal question in the appropriate procedural forum.

Petitioner attempts to convince this

court that the decision sought to be reviewed is in conflict by alleging certain federal cases which discuss the existence or non-existence of common law immunities under federal causes of action. Without fully addressing same herein[15] it is clear that Congress' enactment of *42 U.S.C. §1983* did not intend to abrogate or eliminate traditional common law immunities. *Burns v. Reed*, 111 S.Ct. 1934 (1991).

Subparagraph (c) of the *United States Supreme Court Rule 10* discusses the consideration given in an instance where a state court has decided an **important** question of federal law which has not been decided by the Supreme Court, but should be. This is simply not the case in the instant action as again the state court did not decide a federal question, much less an **important** federal question. Additionally,

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[15] This will be done in Section III below.

this Court has rendered its opinions on the existence or non-existence of immunities and on the elements of a cause of action sounding under *42 U.S.C. 1983* and *18 U.S.C. 1964*.

However looking beyond the technical statutes of jurisdictional entitlement, and rules of judicial discretion, one must merely resort to common sense to determine whether or not this Court should exercise its discretion in favor of declining jurisdiction.

Notwithstanding the discussions of the appropriate elements of a RICO action, or *§1983* action[16], it seems incredulous that the Congress of these United States of America intended for these federally created causes of action to apply to cases such as the instant one.

II(a). ACCESS TO THE COURT?

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[16] Discussed, *infra*, at Sections III and IV.

Our Founding Fathers' creation of the Constitution and the Bill of Rights certainly could not have intended to include the facts in this case when creating the undeniable right of access to the courts. The Petitioner has not been denied access to the courts in any way, shape, or form as was contemplated by the creation of either the Constitution, its amendments, or *42 U.S.C. §1983*.

Ms. Donner has been involved in the initial lawsuit which gave rise to the picketing occurrence; picketed on the steps of the courthouse; filed a lawsuit against the city, the police officer, and her jailors; sought and received access of the courts in the writ of mandamus proceedings, seeking access to the personal litigation files of the city and city attorneys; filed yet another action in state court suing the INITIAL DEFENDANTS together with THE ATTORNEYS; and in each one of these cases

exercised her right of appeal, and rights to seek discretionary review of every layer of court in the State of Florida (eight (8) times); and, now seeks access to this United States Supreme Court.

It is not possible that the Founding Fathers in the creation of the Constitution, nor Congress, through its enactment of the statutes and amendments, nor this Court, in its formulation of federal remedies for federal wrongs, could have possibly intended to create a federal cause of action for denial of access to the courts in favor of a loosing party in a lawsuit who alleges that the other party lied or was untruthful in some way and that that was a possible reason for the loss.

II(b). RICO?

Congress created the Racketeer Influenced and Corrupt Organizations statutes (RICO) for the purposes of doing away with organized crime, the mob. One

must look no further than *Section 1 of Organized Crime Control Act of 1970* which sets forth the purpose of said act as follows:

> "The Congress finds that (1) organized crime in the United States is a highly sophisticated common and diversified and widespread activity that annually drains billions of dollars from America's economy for unlawful conduct in illegal use of force, fraud and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loansharking, theft and fencing of property, imploration and distribution of narcotics and other dangerous drugs and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic process; (4) organized crime activities in the United States weaken the stability of the nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security and undermine the general welfare of the nation and its citizens; and (5) organized

> crime continues to grow because of defects in the evidence gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities to those engaged in organized crime and because of the sanctions or remedies available to the government are unnecessarily limited in scope and impact.
>
> It is the purpose of this act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process by establishing new penal prohibitions and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."

There is a no set of facts alleged in the Complaint, various briefs on appeal, or in the Petition for Writ of Certiorari filed in this Court which do, or could possibly, allege conduct which Congress intended to eradicate, control and/or penalize under the Racketeer Influenced and Corrupt Organizations Statutes.

II(c). PETITIONER HAS MADE A MOCKERY OF THE JUDICIAL SYSTEM

The Petitioner has attempted to (a) prolong the costly nuisance of these various interminable and harassing lawsuits arising out of a 1975 arrest, and, (b) burden this Court with frivolously asserted non-existent federal issues.

This Court should not lend credence to, or in any way justify these efforts. Accordingly, this court should exercise its discretion in favor of declining jurisdiction over this frivolous and vexatious lawsuit.

III. THE PETITIONER'S COMPLAINT DOES NOT SET FORTH A FEDERAL CAUSE OF ACTION SOUNDING UNDER 42 U.S.C. §1983 FOR DENIAL OF ACCESS TO THE COURTS.

Petitioner argues that she stated a cause of action under *42 U.S.C. §1983* for denial of her rights of access to the courts. The complaint, however, fails to set forth such a cause of action. Rather, the record demonstrates a colorful, yet

disturbing history of Petitioner's abuse of the court system over some seventeen (17) years.

Certainly, the Constitution, and its amendments, provide a right of access to the Courts. *United States Constitution Article IV Section II; Amendments I, V, XIV*. However, the Constitutional right of access to the Court refers only to the right to petition the court for redress of grievances; it does not encompass any right to obtain information to substantiate such a claim. *Doe v. Schneider*, 443 F.Supp. 780 (D.C. Kansas 1978). The cases cited by the litigant are inapplicable to the instant case and fail to set forth the denial of her right to access to the courts, as does her complaint fail to set forth a cause of action for same.

In *Ryland v. Shapiro*, 708 F. 2d. 967 (5th Cir. 1983), the conduct complained of is the destruction of, and/or lack of

effort to investigate, evidence ***prior to any litigation.*** In that case, the plaintiff was prevented, through such destruction or lack of effort from even knowing that a cause of action existed. Due to the information dispersed by the police department, the plaintiff in *Ryland* believed that her daughter had committed suicide. She did not know that her daughter was murdered, due to the failure of the police department to properly investigate, and due to their withholding of information with respect to the shooting incident.

Believing that her daughter's death was the result of a suicide rather than murder, the plaintiff in *Ryland* did not bring any cause of action for wrongful death whatsoever and such a cause of action would have been available to her had the state actors properly investigated and delivered evidence. ***Thus, she was***

prevented from filing an action, and the court determined that such was a impingement upon her federal right of access to the courts. *Ryland, supra*.

In *Harrison v. Springdale Water and Sewer Commission*, 780 F.2d 1422 (8th Cir. 1986), a land owner sufficiently stated a cause of action under *§1983* for infringement of their constitutional rights of access to the courts. The plaintiffs, Harrisons, filed a cause of action against the city for an alleged pollution of their property by the city. The city filed a frivolous condemnation counterclaim "as a tactical move to put pressure on the Harrisons to settle their damages claim against the city". The allegations in the complaint were such that the city had no plan for using the property, that the conduct was purely vexatious and harassing and was totally without legal basis. This conduct, (much like denying certain basic

privileges to prisoners who file habeas corpus actions) constitutes a denial of access to the courts.

The court reasoned that the conduct has a chilling effect on the particular litigant in question, as well as other litigants who may choose to file an action. *Harrison* essentially is a federal cause of action for malicious prosecution, and/or for what happens to habeas corpus prisoners (i.e. penalizing, chilling, and otherwise preventing persons from seeking redress of grievances in the court system.)

The instant case is factually distinguishable from the *Harrison v. Springdale Water and Sewer Commission*, *supra*, case as well. Here, the actions by the INITIAL DEFENDANTS could not possibly constitute an affirmative claim or frivolous or vexatious claim against the Petitioner. The conduct of the INITIAL DEFENDANTS cannot constitute conduct

designed to, or having the effect of, punishing the Petitioner for her attempt to access the courts for redress of grievances or having a chilling effect on her or other persons similarly situated such that they could not or would not access the courts.

Further, the complaint does not allege that the conduct was taken in retaliation for the Petitioner having exercised her constitutional rights to seek judicial relief. Nor did the complaint allege that the actions have had such a chilling effect. Rather, the only thing that the complaint alleges is that the INITIAL DEFENDANTS and THE ATTORNEYS answered interrogatories and requests for production which answers the Petitioner alleges were untrue, and hindered her ability to win her case.

It is somewhat surprising that Ms. Donner could be possibly be heard to complain that her federally guaranteed

right of access to the courts has been hampered. She has now filed three (3) lawsuits and in each has exercised her right to appeal (eight (8)) at all levels of the state courts. Indeed she now seeks and has access to this Court to redress her grievances.[17]

It must be pointed out that though there is a constitutional right to access the courts:

> "The right of access to the courts is neither absolute nor unconditional, and there is no constitutional right of access to the courts to prosecute an action that is frivolous or malicious. No one, rich or poor, is entitled to abuse the judicial process. *Tripati v. Bemanan*, 878 F. 2d 351 (10th Cir. 1989)." (Citations omitted.)

Based upon her complaint, briefs and Petition, no federal rights, privileges or immunities were deprived by the alleged

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[17] Of course, the Respondents assert that this Court either lacks jurisdiction, or should not accept it.

conduct, other than the Petitioner's federal right of access to the courts.

One need not look at the immunity issue presented by the Petitioner as she has failed to state a cause of action for denial of access to the courts notwithstanding any potential defenses.

However, in that the Petitioner does, at great length, discuss the issue of immunity in her Petition, same will be addressed herein under *United States Supreme Court Rule 15.1*.

The Petitioner's reliance on *Howlett v. Rose*, 537 So.2d 706 (Fla. 2d DCA 1989), is most inapplicable. In *Howlett*, the state court determined that a arm of the state, a county school board, was entitled to an absolute sovereign immunity in an action brought by a minor under *42 U.S.C. §1983*. The state court determined that the question of whether sovereign immunity exists is a question of state law and not

federal law.

This Court in *Howlett v. Rose*, 110 S.Ct. 2430 (1990) correctly ruled that the state court as a court of general jurisdiction was compelled to hear federal based causes of action, and that the state statutory assertion of sovereign immunity was not applicable to federally based causes of action. This Court reaffirmed its holding in *Martinez v. California*, 444 U.S. 277 (100 S.Ct. 553), 62 L.Ed. 2d 481 (1980). There, it was held that a state cannot immunize an official from liability for injuries compensable under federal law. That point is not argued herein.

Rather, the position of the Respondents is that there are long standing common law immunities which apply to cases brought under *42 U.S.C. §1983*, as they do to other actions. *Burns, supra; Briscoe v. LaHue*, 460 U.S. 325 (1983). Those common law immunities which existed prior to the

enactment of *42 U.S.C. §1983* have not been abrogated by its creation. *Burns, supra.* There has long since been an immunity afforded to litigants for litigation related conduct. Such common law is well established in the various Florida cases cited by these Respondents in their previous briefs, and indeed by the Third District Court of Appeal decision. These common law immunities have long since stood and are not abrogated by the creation of the federal cause of action. *Burns, supra.*

The Petitioner's complaint fails to set forth a cause of action for denial of access to the courts and further, assuming *arguendo* that the complaint does set forth denial of that or some other federal right, the absolute immunity afforded to the litigants bars such an action. *Robertson v. Industrial Insurance Company*, 75 So.2d 198 (Fla. 1954); *Meyers v. Hodges*, 44 So. 357 (Fla. 1907); *Ponzoli and Wassenberg v.*

Zuckerman, 545 So.2d 309 (Fla. 3d DCA 1989); *Perl v. Omni International of Miami, Ltd.*, 439 So.2d 316 (Fla. 3d DCA 1983); *Sailboat Key, Inc. v. Gardner*, 378 So.2d 47 (Fla. 3d DCA 1979); *Regal Marble, Inc. v. Drexel Investments, Inc.*, 515 So.2d 1015 (Fla. 4th DCA 1987); *Wright v. Yurko*, 446 So.2d 1162 (Fla. 5th DCA 1984). Those privileges and immunities appear on the face of the complaint and accordingly the complaint fails to set forth a cause of action upon which relief can be granted. *Flye v. Jeffords*, 106 So.2d 228 (Fla. 1st DCA 1958).

The reasoning of these rules of law are both sound and well established. The courts have stated:

> "The policy reasons for the privilege have often been repeated:
>
> > 'In fulfilling their obligations to the clients and to the court, it is essential that lawyers, subject

> only to the control by the trial court and the bar, should be free to act on their own best judgment in prosecuting or defending a lawsuit without fear of later having to defend a civil action for defamation for something said or written during the litigation.' " *Ponzoli, supra at 310.* (Citations omitted.)

The common law of immunity extends to actions sounding not only in defamation but in fraud and as stated in *Perl*, citing *Robertson*, by reasoning:

> "The grounds upon which the rule of absolute privilege is sustained as to judicial proceedings is that all persons connected with the proceedings should be free from fear of being called upon to defend suits arising as a result of derogatory disclosures and that to permit such suits would result in a circuitry of actions by which the same issues tried in the judicial proceedings could be retried." *Perl, supra, at 318.* (Citations omitted.)

That is exactly was is going on here.

The Petitioner believes that she has been wronged during the 1976 litigation discovery process. Any wrongs, and their remedies, be they under state, or federal law, should be addressed in the original 1976 litigation to avoid circuitousness and, a multiplicity of suits, and to ensure the correct procedural forum.

The repercussions of the conduct of THE ATTORNEYS and the INITIAL DEFENDANTS should be left to the discretion of that court wherein the alleged conduct has occurred; be that either by a state or federal cause of action or remedy; through contempt proceedings; sanctions; and/or through admonishment by the state bar. *Buchanan v. Miami Herald Publishing Company*, 237 So.2d 9 (Fla. 1969); *Wright, supra, at 1164.*

IV. PETITIONER'S COMPLAINT DOES NOT SET FORTH A FEDERAL CAUSE OF ACTION SOUNDING UNDER 18 U.S.C. §1964 FOR A FEDERAL RICO VIOLATION IN THAT IT FAILS TO ALLEGE

SUFFICIENT CRIMINAL PREDICATE ACTS, AND FAILS TO ALLEGE AN INJURY RECOGNIZED BY RICO STATUTES.

The RICO statutes were not designed to encompass this case[18] even assuming each and every allegation of the Petitioner as being true and taking each and every inference therefrom in favor of the Petitioner. This simply isn't what RICO stands for.

However, to the extent that RICO is thoroughly discussed by Petitioner, counter argument shall be presented herein pursuant to *United States Supreme Court Rule 15.1.*

The complaint fails to state a cause of action for a civil remedy under the Federal RICO Statutes, *18 U.S.C. §1961-1964* and was appropriately dismissed. The Petitioner's complaint does not allege any criminal predicate acts to qualify for RICO. The Petitioner attempts to allege a

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[18] See II(b).

pattern of mail fraud by claiming the INITIAL DEFENDANTS, through THE ATTORNEYS made written misrepresentations to her, during litigation, which were sent through the United States mail. [See Appendix A-1 through A-21, subparagraphs 8(a) through (h), 22, 23, 24, and 29.] The issue is not whether there were misrepresentations in the discovery. The issue is solely whether the mailing of such discovery is mail fraud as defined in *18 U.S.C. §1341*. The answer is no. As there was no mail fraud the complaint fails to allege predicate acts and, therefore, the complaint was appropriately dismissed.

The act of sending even false answers to interrogatories and responses to request for production through the mail does not violate the Federal Mail Fraud Statute. *18 U.S.C. §1964* allows a civil remedy for any person injured in his business or property by reason of a violation of *18 U.S.C. §1962*

(RICO). *18 U.S.C. §1962* prohibits, among other things, "patterns of racketeering activity" as "...any act which is indictable under...*18 U.S.C. §1341* (relating to mail fraud)". Pursuant to *18 U.S.C. §1961*, the predicate act complained of (mail fraud) must be indictable under the appropriate statute (*18 U.S.C. §1341*, mail fraud). The "racketeering activity" must be an act in itself subject to criminal sanctions. It must be an act or practice which is treated, traditionally, as criminal in nature. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 105 S.Ct. 3275 (1985); *Kleiner v. First National Bank*, 526 F. Supp. 1019 (M.D. Ga. 1981). Sending responses to discovery, whether false or not, through the mail, is an action which is not indictable, not subject to criminal sanctions and has not been treated traditionally as criminal in nature.

Courts have specifically held an

attorney's (or party's) action of sending even false statements through the mail during litigation is not punishable under the Mail Fraud Statute. To allow such action would chill the ability of attorneys (or parties) to adequately and zealously represent their clients interests in litigation, *McMurtry v. Brasfield*, 654 F. Supp. 1222 (E.D. Ba. 1987). In *Spiegel v. Continental Illinois National Bank*, 609 F. Supp. 1083 (D.C. Ill. 1985) where the RICO claim involved a predicate act of an attorney sending a false statement to another attorney through the mail during litigation, the court stated:

> "In the view of the court, false statements made between attorneys in the context of pending litigation are outside the scope of the Mail Fraud Statute. No fiduciary duty exists and the parties are dealing at arms length. The appropriate remedy in such a case would be to lodge a Complaint with the appropriate disciplinary body or apply to the court for assistance. A RICO action for treble damages is

hardly an appropriate solution." *McMurtry*, at *supra*.

In discussing the same issue, the Court in *McMurtry* stated that subjecting such correspondence to a Mail Fraud Statute would chill an attorney's effort and duty to represent his client during the course of pending litigation, and, as in the case at bar, give birth to collateral suits. Therefore, as the predicate acts alleged in the complaint are not indictable under the Mail Fraud Statute, the complaint failed to state a claim for civil RICO and was appropriately dismissed.

Petitioner cites *U.S. v. Peters*, 732 F.2d 1004, (1st Cir. 1984), in support of her position that mailing of interrogatory answers gives rise to a RICO violation. That case involves two defendants who were charged with the criminal RICO violations for committing arson of their warehouse and attempting to collect on the insurance

policies. They mailed sworn statements of loss in furtherance of their arson/insurance fraud conspiracy. The defendants therein, the Court held, knew that as a furtherance of their initial criminal conspiracy, "their attorneys would send the insurance claims forms and interrogatory answers through the mail or that the Defendants knew these mailings would follow in the ordinary course of business." Arson and insurance fraud are acts traditionally considered criminal in nature. *Peters* is inapplicable to the instant case.

Petitioner also cites *U.S. v. Vaughn*, 797 F.2d 1485 (9th Cir. 1986) as supporting her contention that an attorney is susceptible to a mail fraud conviction for a petition and follow up letters he knew to be false. There, the attorney was charged with conspiracy to import marijuana, aiding and abetting importation of marijuana and

making a false statement to a government agency together with the four counts of mail fraud. The attorney was involved with the conspiracy to import marijuana and in furtherance of the conspiracy to import marijuana (traditionally a criminal act) the attorney submitted petitions and false documents to federal agencies to obtain the aircraft used to smuggle the drugs. *Vaughn* is inapplicable to the instant case.

Finally, Petitioner sets forth the case of *U.S. v. Leyden*, 842 F.2d 1026 (8th Cir. 1988). *Leyden* does not hold that mailing of a pleading can serve as the basis for a mail fraud prosecution. Rather, *in Leyden*, the mailing of the insurer's responsive pleading was held <u>not</u> to serve as a basis for a mail fraud prosecution. Even still, *Leyden* also dealt with a criminal prosecution arising under a predicate act of arson for the purposes of insurance fraud.

The Petitioner's complaint also fails to state a cause of action as the injury claimed is not one recognized under the RICO Statutes. *18 U.S.C. §1964(c)* provides that a person may sue who is injured in his "business or property" by reason of a violation of *§1962*. Congress did not intend for victims of predicate acts to recover for all types of injuries suffered. Therefore, the limitation. *Sedima, supra; Grogan v. Platt*, 1835 F.2d 844 (11th Cir. 1988). Personal injury claims are not injuries to business or property and are precluded. *Sedima, supra; Grogan, supra.*

The Petitioner's complaint alleges damages in the 1976 civil complaint, out of which this action arises, solely for personal injuries. The complaint alleges that damages for the personal injury claim would have been more had it not been for the alleged misrepresentations. Therefore, the damages are claimed for personal

injuries. As the complaint fails to state a cause of action for civil RICO, it was appropriately dismissed.

CONCLUSION

The Petitioner has failed to, and cannot properly invoke the jurisdiction of this Court under *28 U.S.C. §1257(a)*. Indeed, even if said jurisdiction could be invoked, this Court should exercise its discretion in favor of declining jurisdiction over this frivolous, vexatious, colorless and meritless lawsuit. Nothing presented by the Petitioner in any way sets forth a real federal cause of action, much less one which is substantial or important. The Founding Fathers and Congress in no way intended the federal Constitution, statutes and remedies to apply to this Petitioner or to the conduct complained of in this case.

Wherefore, the Respondents herein

respectfully request that this Court dismiss the petition for want of jurisdiction, and/or in the alternative exercise its discretion and decline its jurisdiction over this matter.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 24th day of February, 1992, to: E. S. CORLETT, III, ESQUIRE, 116 West Flagler Street, Miami, FL 33130; and to MIRIAM DONNER, Post Office Box 1232, Hallandale, FL 33008-1232.

Respectfully submitted,

David Kleinberg, Esquire
GAEBE, MURPHY, MULLEN
ANTONELLI & GERLIN
420 South Dixie Highway
Third Floor
Coral Gables, FL 33146
Tel.: (305) 667-0223

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 89-37625 CA 17

MIRIAM DONNER,

Plaintiff,

v.

COMPLAINT

APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, CITY OF MIAMI, VERNON HETHERINGTON, FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A., a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,

Defendants.
_____/

Plaintiff Miriam Donner sues Defendants Appalachian Insurance Company, a Rhode Island corporation (hereinafter referred to as Appalachian), City of Miami (hereinafter referred to as the City), Vernon

Hetherington (hereinafter referred to as Hetherington) Fowler, White Burnett, Hurley, Banick & Knight, P.A. a/k/a Fowler, White, Hurley, Banick & Strickroot, P.A., a Florida professional association (hereinafter referred to as the P.A.), Phillip W. Knight (hereinafter referred to as Knight) and Michael J. Murphy (hereinafter referred to as Murphy) and alleges:

1. (a) This is an action for damages in excess of $5,000, exclusive of interest, attorney's fees and costs.

(b) Appalachian is an insurance company authorized to do business in the state of Florida.

2. In Case No. 76-8301 filed in the above-styled Court, Plaintiff Miriam Donner sued Defendants City of Miami Police Officer Hetherington, the City, Appalachian, Metropolitan Dade County (hereinafter referred to as Dade County), certain Dade County correctional officers, et al.

3. In that suit, plaintiff alleged inter alia that

(a) While she was exercising her First Amendment rights to picket and gather signatures upon a petition, she was falsely arrested on a criminal charge of breach of peace, imprisoned by Hetherington, acting within the course and scope of his employment as a City Police Officer, and deprived of her civil rights under color of state law;

(b) as a result of that arrest, she was imprisoned in the Dade County Women's Annex as a pretrial detainee for five days;

(c) while so imprisoned, the personnel of that Annex, acting within the course and scope of their employment as employees of Dade County and under color of state law, physically assaulted her, stripped her naked, and left her penned in a cold solitary cell (all in full view of male prison personnel) without clothing,

blankets, towels, linen, medical attention, exercise facilities, soap, toilet paper, running water, other elements or personal hygiene or operable toilet for about four days;

(d) after hearing the testimony of arresting Officer Hetherington, the court granted Donner's motion to dismiss the criminal charges lodged by Hetherington against her and dismissed those charges;

(e) as a result of the foregoing, she suffered mental anguish, humiliation, disgrace, physical pain and embarrassment, for which she sought damages, (compensatory damages against all defendants and additional punitive damages against the individual defendants).

3. Since Appalachian had issued a liability insurance policy to the City and its police officers for the policy period including the dates of the incidents alleged in the complaint, Appalachian was joined as

a defendant in that suit in its capacity as liability insurer of the city and of Hetherington in regard to the claims asserted.

4. Knight, Murphy, Fred Ober, and Greg Gaebe respectively were attorneys employed by the P.A., a professional association engaged in the practice of law. Knight was at all relevant times a partner in the P.A. until his separation from the P.A. in 1979. Murphy became a partner in the P.A. before his separation in 1985 but the date of inception of his partnership position is unknown.

5. Appalachian retained, maintained, and supervised the legal services of the P.A. to represent Appalachian, the City and Hetherington in regard to the claims asserted in Case No 76-8301.

6. (a) In particular, the P.A. did appear in that case in behalf of those defendants through attorneys Knight, Murphy,

Fred Ober, and Greg Gaebe.

(b) Moreover, Knight and the P.A. appeared in that case in behalf of Dade County and the Dade County correctional officers.

7. The City, Hetherington, and Appalachian asserted in their answers various defenses.

8. In the course of pretrial discovery proceedings in that case and under color of state law, the City, Hetherington, Appalachian, the P.A., and Knight, in conspiracy with one another, engaged in a scheme and pattern of fraudulent misrepresentation to plaintiff and to the Court through service by mail of papers through the U. S. Postal Service, including inter alia the following:

(a) the City's April 12, 1976 answers to interrogatories nos. 4,6, and 7 (served with the complaint) served upon plaintiff by P.A. through Knight (representing that

witnesses to the arrest incident were "unknown" and that insurance coverage is "unknown");

(b) Hetherington's May 25, 1977 answers to interrogatories nos. 5, 5c, and 7 served upon the plaintiff by the P.A. through Knight (representing as the only insurer Appalachian and representing that the only statement given by Hetherington concerning the incident was a July 1, 1975 statement to Officer P.F. Kumalae);

(c) March 20, 1978 letter from Knight and the P.A. in behalf of the City to the Court (representing that the City had only two statements of its officers with regard to that incident and that all such statements were being supplied to the Court pursuant to its discovery order);

(d) service upon plaintiff of the March 21, 1978 response of the City through its attorneys, the P.A., and Knight, to plaintiff's request for production nos. 3

and 9 (representing that all records requested in those requests and ordered to be produced in the aforementioned discovery order had been produced);

(e) their March 31, 1978 reservice upon plaintiff and refiling of the said March 21, 1978 response;

(f) service upon plaintiff of the May 8, 1978 response of the City through its attorneys, the P.A. and Knight, to plaintiff's request for production (again representing that all of the records ordered to be produced in that discovery order had been produced);

(g) service upon plaintiff of Hetherington's and the City's 1978 response to plaintiff's motion for sanctions (again repeating the aforementioned representation);

(h) service upon plaintiff of Hetherington's and the City's July 21, 1978 response to plaintiff's request for

production (representing the limits of insurance coverage).

9. Those representations were false. Among the false aspects of those representations were the following:

(a) (i) the names and addresses of witnesses to the arrest incident (i. e. John McBride and Bill Urbiza) were known to the defendants, to the P.A., and to Knight ever since 1975;

(ii) those witnesses were no longer available to provide testimony when finally plaintiff was able through other means to learn their names;

(b) (i) in addition to the single July 1, 1975 statement of Hetherington and single June 23, 1975 statement of Officer Parker that were produced and disclosed, other statements were at all relevant times known to, and in the custody and control of, the defendants; included inter alia among those concealed statements were the following:

Hetherington and Officer Parker, on May 6 and May 7, 1975 respectively, executed written statements to Sargeant Chapek about the arrest incident, supplied to the P.A., to Knight, to Appalachian, and to the City, that were concealed in Hetherington's aforementioned answers to interrogatories and in the City's and Hetherington's aforementioned responses;

(ii) while the June 23, 1975 and July 1, 1975 statements that were produced both contained an allegation that plaintiff stated she wanted to be arrested, the earlier statements that were withheld omitted any such allegation; moreover, the withheld May 6, 1975 statement served to confirm the time of arrival of Hetherington on the scene of the arrest;

(iii) Hetherington stated under oath that the June 23, 1975 and July 1, 1975 statements that the City produced were not authentic;

(c) two liability policies issued by Columbia and California Union Insurance Company affording $1,000,000 limits and a $5,000,000 limit policy issued by Houston General Insurance Company to the City and to its police officers covering the period during which the arrest of plaintiff took place and covering the claim was concealed;

10. Those representations were known by the respective defendants to be false when made or alternatively were made without knowledge of whether they were true or false.

11. Those representations were made with the intention that plaintiff should rely upon them as true.

12. Those representations were material to the preparation and presentation of plaintiff's case for trial, not only against these defendants, but also against Dade County and the Dade County correctional officers joined as defendants.

13. Plaintiff relied upon the truth of those representations in preparing and presenting their case for trial to her detriment.

14. If defendants would have truthfully disclosed the that aforementioned withheld statements existed and were in the custody and control of the City, Appalachian, Hetherington, the P.A. and Knight, plaintiff could have effectively argued to the Court that discovery sanctions, including the entry of default, should be imposed upon the City and Hetherington for their violation of the prior discovery order requiring the production of those statements.

15. At the April, 1980 trial of that case, the P.A., Ober, and Murphy (and the office of the Dade County Attorney) appeared in behalf of the defendants.

16. (i) At that trial, Hetherington testified that plaintiff told him at the time of arrest that she wanted to be

arrested and sought to cast doubt upon plaintiff's evidence of his time of arrival on the scene of the arrest.

(ii) A central element in plaintiff's proofs was that Hetherington's time of arrival was at "1420", the same time as the arrest.

(iii) Hetherington had testified that in his mind plaintiff's conduct when he first observed her was in a gray area, not enough to form the basis for an arrest but contrary to the notations on the arrest report and on his worksheet he variously testified at trial that he did not then arrest her or that he arrived earlier on the scene.

(iv) Plaintiff alone was able to testify on the other hand that Hetherington arrested her immediately without any probable cause and that she did not state that she wanted to be arrested;

(v) If plaintiff would have had access to the records withheld as a result of the foregoing misrepresentations and if defendants would not have falsely represented under oath that the remaining statements were not authentic, plaintiff could have conducted further pretrial discovery to uncover evidence that plaintiff could have introduced at trial to impeach and contradict Hetherington's testimony and plaintiff could have produced evidence impeaching and contradicting that testimony.

(vi) Although the P.A., Ober and Murphy were fully cognizant of the prior scheme or pattern of fraudulent misrepresentations, in furtherance of that scheme, under color of state law, and in conspiracy with one another and with the other defendants, they continued to conceal from plaintiff the truth and to avail their clients at trial of the advantage thereby gained.

17. (a) At that trial, the Court directed a verdict in favor of the City, Hetherington and Appalachian and entered judgment on that verdict in favor of those defendants.

(b) If defendants would not have committed the aforementioned fraudulent misrepresentations, plaintiff could have presented additional evidence at trial that would have avoided the entry of that directed verdict and the necessity, expense, and mental anguish of the appeal that was thereby necessitated.

18. That verdict and the ensuing judgment in favor of those defendants was reversed on appeal.

19. At that trial, after the verdict was directed, plaintiff's claims against Dade County and the Dade County correctional officers were submitted to the jury.

20. In closing argument to the jury, the Dade County Attorney generally attacked

plaintiff's credibility and specifically pointed out to the jury Hetherington's testimony that plaintiff allegedly stated she wanted to be arrested and he argued to the jury that since she wanted to be arrested she was not entitled to any substantial damages for the conditions of her incarceration.

21. The jury returned a verdict in favor of plaintiff and against the remaining defendants but, as a result of those fraudulent misrepresentations, only in the sum of Fifteen Thousand Dollars.

22. (a) In furtherance of the aforementioned scheme or pattern of fraudulent misrepresentations, with knowledge of the fraudulent character of those representations, and in conspiracy with one another and with the other defendants, Murphy and the P.A., acting in behalf of Hetherington, Appalachian and the City, under color of state law, falsely

represented to plaintiff and to the Court at an October 23, 1981 hearing that defendants are not trying to hide anything and are not claiming any privilege that plaintiff can have any records she wants so long as the request is channeled through Murphy.

(b) On October 28, 1981, plaintiff made a public records demand upon the City of Miami Attorney and upon the P. A. and Murphy to produce their respective case files relating to the claims asserted in Case No. 76-8301.

23. Included in those case files were all of the aforementioned statements, records referring to those statements, records confirming defendants' knowledge at all relevant times of the existence of those records and of the existence of the aforementioned withheld names and addresses of witnesses and of the existence of the aforementioned withheld liability insurance policies.

24. In response to that request, in order to conceal that scheme or pattern of fraudulent misrepresentations, and in order to deprive plaintiff of her claims asserted in Case No. 76-8301, the City and the P. A. and Murphy, acting in conspiracy with one another and with the other defendants and acting in behalf of and in concert with the City and under color of state law, responded that the demanded records would be produced only when donkeys fly.

25. As a result, plaintiff as Relator was forced in 1981 to initiate a mandamus proceeding (Case No. 81-369 EX later renumbered as Case No. 83-9287 CA 26) against Respondents Assistant City Attorney Steve Edelstein, Murphy, the P. A., and the City to gain access to those records.

26. That proceeding was litigated at all levels of the Florida court system over a period of four years and finally resulted

in the issuance of a writ of mandamus requiring those Respondents to produce the demanded public records.

27. For the first time, on August 19, 1985, plaintiff received notice of the entry of that writ and on that date Respondents produced to plaintiff for inspection certain of the demanded records.

28. During the pendency of the public records mandamus preceeding, Case No. 76-8301 was stayed.

29. In furtherance of that scheme or pattern of fraudulent misrepresentations and of the said conspiracy, Appalachian financed the P. A.'s and Murphy's defense of the mandamus proceeding.

30. As a further result of that scheme or pattern of fraudulent misrepresentation, the said conspiracy and the aforementioned efforts to conceal them and the resulting delays and litigation,

(a) plaintiff has incurred emotional stress, mental anguish, and aggravation of a prior physical condition, to-wit, headaches;

(b) relevant evidence useful to plaintiff in the prosecution of her claims (including claims for violations of her civil rights) has been lost;

(c) the memories of material witnesses useful to plaintiff in the prosecution of her claims (including claims for violations of her civil rights) have prejudicially faded;

(d) plaintiff devoted substantial time to the prosecution of the said discovery efforts and to the public records proceeding.

Wherefore, plaintiff demands judgment against defendants for triple compensatory damages, for punitive damages, for any attorney's fees that may be incurred in the

prosecution of this action, and for her costs.

MIRIAM DONNER, Plaintiff
P. O. Box 1232
Hallandale, Florida 33009

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 89-37625 CA 17

Miriam Donner,	*
	*
Plaintiff,	*
	*
vs.	*
	*
APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, CITY OF MIAMI, VERNON HETHERINGTON, FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A., a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,	*
	*
Defendants.	*
	*

PLAINTIFF'S MOTION FOR REHEARING

Plaintiff Miriam Donner moves the Court to rehear its order entered March 27, 1990 and upon rehearing to set aside or alternatively amend that order in accordance with the following grounds.

PLAINTIFF'S OBJECTION TO PURPORTED VERIFICATION OF MOTION

In entering that order, the Court may have overlooked Plaintiff's March 5, 1990 "Objection" to defense counsel's purported "verification" of Defendants City of Miami's and Hetherington's motion to dismiss. That verification was not stated to be on personal knowledge and no facts were alleged that showed it to be on personal knowledge. Moreover, that motion contains merely legal conclusions and no factual assertions. Nor was that motion supported by any documentation.

In entering that order, the Court may also have overlooked that, in any event, one may not look beyond the four corners of the allegations of the complaint to determine whether the complaint states a cause of action. Any alleged res judicata, collateral estoppel, limitations, or waiver is a matter in avoidance that must be pleaded as an

affirmative defense; such an affirmative defense may not be interposed in a motion to dismiss unless the allegations of the complaint are alone sufficient to affirmatively establish that defense. The allegations of the instant complaint do not establish any such defenses.

In entering that order, the Court may have overlooked that, with regard to the statute of limitations, paragraph 17 of the complaint clearly sets out that the date when certain allegedly concealed records were made available to plaintiff and therefore the date when first the alleged fraud could have been discovered was not before August 19, 1985, just four years before the date of commencement of suit (Monday August 21, 1989). A plaintiff is under no obligation to anticipate the defense of the statute of limitations by alleging the "date of discovery" in the complaint.

In entering the order, the Court may have overlooked that, with regard to the claim of res judicata or collateral estoppel, the only judgments alleged in the complaint are (a) plaintiff's money judgment against Dade County in Case No. 76-8301 and (b) the writ of mandamus issued against the City of Miami, Murphy, Fowler, White, and Assistant City of Miami Attorney Edelstein in the public records proceeding, Case No. 83-9287. The allegations of the complaint do not affirmatively demonstrate that there is any "privity" between Dade County and the City, City of Miami Police officer Hetherington, the City's insurer Appalachian, Fowler, White, Knight, or Murphy that would in any manner entitle defendants to set that judgment up as collateral estoppel or res judicata in the case at bar. Moreover, any collateral estoppel effect of the peremptory writ of mandamus in Case No. 83-9287 would

necessarily reinforce plaintiff's claims in the case at bar that she was entitled to access to the records held to be public records that were allegedly concealed from her in Case No. 76-8301. No aspect of that writ in any way detracts from plaintiff's instant cause of action. The complaint does not disclose that the instant claims for damages could have been joined in that mandamus proceeding, first because of the nature of that proceeding and second because defendants' alleged conduct complained of in the complaint is not alleged to have been discovered when that proceeding was commenced. No evidence outside the four corners of the complaint can be considered on a motion to dismiss in support of defendants' claim that the action is barred by res judicata or estoppel by judgment.

In entering that order, the Court may have overlooked that, in Wilson v. Wahl, 383 So. 2d 311 (Fla. 2d DCA 1980), the Second

District reversed an order of dismissal, aptly holding:

> It appears that the order of dismissal was entered because there was another action pending between the parties in another division of the same court involving questions of law and fact common to those raised by the complaint in the case at bar. Under these circumstances, we think that administration of justice is best served by an order which averts the piece-meal handling of the claims between the parties. An order which consolidates the actions, rather than the order which dismissed the instant action will effect that desired result.
> ...Fla.R.Civ.P. 1.270. (Emphasis added)

That decision recognizes the inappropriateness of dismissal just because it is alleged that another already-pending action involves common or overlapping questions of law or fact.

In entering their order, the Court may have overlooked that the allegations of the instant complaint clearly state claims upon which relief may be granted. Among the

causes of action stated are

(a) common-law fraud; all the elements of such an action are fully alleged [see allegation in paragraphs 8(a)-(h), 9(a)-(c), 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 30 of complaint];

(b) common-law conspiracy (see paragraphs 4, 5, 6, 8, 16(vi), 24, and 29 of complaint);

(c) an action modeled after Bondu's action against Cedars of Lebanon Hospital approved in Bondu v. Gurvich, 473 So.2d 1307, 1312-1313 (Fla. 3d DCA 1984), rev. denied, 484 So.2d 7 (Fla. 1986) (patient may sue hospital for hospital's loss of records statutorily required to be maintained by the hospital where that loss allegedly resulted in the summary judgment in favor of doctor in patient's medical malpractice suit against that doctor); all of the elements of

a Bondu-type[1] suit are alleged [see paragraphs 8(c), (d), and (f), 9(b)(i) and (ii), 14, 16(v), and 17(b), and 26 of complaint; Sec. 119.01, 119.041, and 119.07, Fla. Stat. (1975). See also Sec. 119.01, 119.041, 119.07, Fla. Stat. (1975); and Edelstein v. Donner, 471 So.2d 26 (Fla. 1985)];

(d) an action under 18 U.S.C. Sec. 1964(c) (Civil RICO), based upon defendants' alleged use of the mails in furtherance of their alleged pattern of conduct, Tafflin v. Levitt, ____ U. S. ____ (Case No. 88-1650, Opinion filed January 22, 1990) (state courts have jurisdiction over federal civil RICO actions; "many RICO cases involve asserted violations of state law, such as state fraud claims") (see paragraphs 8, 8(a)-(h), 22, 23, 24, and 29 of complaint).

In entering its order, the Court may

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[1] Bondu v. Gurvich, 473 So.2d 1307.

also have overlooked that, contrary to the arguments advanced in paragraphs 9 and 10 of the City's motion to dismiss, the doctrine of sovereign immunity does not insulate the City from a federal civil RICO action and therefore Sec. 768.28, and its limitations have no bearing upon the City's liability. The Supremacy Clause of the U. S. Constitution gives priority to the federal, not the state, statute. See Felder v. Casey, 108 S. Ct. 2302 (1988).

If the order was based upon a determination that the complaint was somehow deficient in setting out a cause of action, the Court may have also overlooked the fact that plaintiff was entitled to at least one opportunity to amend and that the said order erroneously failed to grant leave to amend.

Finally, the said order, as worded, is inconsistent.

For all of the foregoing reasons, rehearing should be granted and on rehearing

the said order should be set aside or modified to comport with the foregoing principles of law.

I HEREBY CERTIFY that true copies of the foregoing were mailed to David Kleinberg, Gaebe, Murphy, Mullen & Antonelli, 4601 Ponce de Leon Blvd. Ste. 100 Coral Gables, Fla 33146 and to E. S. Corlett III 116 W. Flagler St. Miami, Fla 33130 this 5th day of April, 1990.

P. O. Box 1232
Hallandale, Florida
33008-1232

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 89-37625 CA 17

MIRIAM DONNER,

Plaintiff,

v.

ADDENDUM TO MOTION FOR REHEARING

APPALACHIAN INS. CO., et al.
Defendants
_____/

Plaintiff Miriam Donner files as an amendatory addendum to her motion for rehearing the additional grounds that the complaint also states a cause of action under 42 U. S. C. Sec. 1983.

I HEREBY CERTIFY that true copies of the foregoing were mailed to David Kleinberg 4601 Ponce de Leon Boulevard Suite 100 Coral Gables, Florida 33146 and to E. S. Corlett

III 116 W. Flagler Street Miami, Florida 33130 this 6th day of April, 1990.

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